LEE KEE FONG

v.

PENINSULAR INNOVATION SDN BHD & ORS

HIGH COURT MALAYA, IPOH
SU GEOK YIAM JC
[CIVIL SUIT NO: 22-25-2000]
19 JULY 2001

CIVIL PROCEDURE: *Action - Abuse of process - Tort of collateral abuse of process - Whether defendants deceptively procured orders for substituted service against plaintiff in sessions court in order to obtain default judgment and to commence bankruptcy proceedings against him - Whether an abuse of process of court - Whether plaintiff had a reasonable cause of action against defendants - Whether plaintiff should be allowed to proceed with action separately in High Court - Rules of the High Court 1980, O. 18 r. 19*

The plaintiff brought this action against the defendants for damages for abuse of process of court in relation to a case that the 1st defendant had brought against the plaintiff in the sessions court. The plaintiff alleged that 1st defendant deceived the court therein when it applied for orders for substituted service of its summons and statement of claim on the plaintiff at an address which it knew fully well was not the current address of the plaintiff in order to achieve a dominant collateral purpose, *ie*, to obtain a default judgment and to commence bankruptcy proceedings against him. Further, that the said acts of the 1st defendant had caused him to be blacklisted by virtue of the bankruptcy notice ('BN') issued against him, as a result of which he could not obtain credit facilities from financial institutions. That in turn injured his reputation and credit worthiness as a businessman and housing developer resulting in his inability to develop a project where he suffered loss of profits amounting to RM2.25 million. The deputy registrar, however, struck out the action. Hence, this appeal.

Held:

[1] The plaintiff had founded his cause of action for abuse of process against the defendants not in the filing of the 1st defendant's case against him in the sessions court but on the use of substituted service, default judgment and bankruptcy proceedings against him. If his allegations were true, then the defendants had abused the process of court by initiating the said acts in order to cause oppression on him resulting in injury to his reputation and credit worthiness as a businessman and housing developer. (p 596 c-e)

[2] Whether the plaintiff would succeed in his claim based on an abuse of process would depend on the outcome of his writ action. It is trite law that the plaintiff should not be deprived of the opportunity of proving his claim in court even if his case was weak and unlikely to succeed unless the defendants could satisfy the court that the plaintiff's claim was obviously unsustainable. (p 596 e-g)

[3] The *sub judice* argument did not arise because the cause of action for abuse of process was not dependent on the outcome of the 1st defendant's claim against the plaintiff in the sessions court. (p 596 g-h)

[4] In determining whether the plaintiff had a reasonable cause of action against the defendants for abuse of process, the court must rely solely on the plaintiff's statement of claim in line with O. 18 r. 19(2) of the Rules of the High Court 1980 which expressly prohibited an applicant from relying on evidence. The court has to read the statement of claim as a whole, viewing each paragraph in relation to the others, bearing in mind that the paragraphs could not be viewed in isolation and assuming that all the allegations in the statement of claim were true. The court found that the plaintiff's statement of claim had clearly set out the various allegations against the defendants. (pp 596 h-i & 597 a-b)

[5] This was not a plain and obvious case for striking out although the BN issued against the plaintiff was based on a valid judgment in default at the relevant time. The reason being, the process was not initiated *bona fide* in order to enforce the just claims of the 1st defendant. The plaintiff's claim for damages for abuse of process was also not frivolous nor vexatious because the defendants had not shown that it was not impossible for the plaintiff to succeed in his claim for abuse of process against the defendants based on the said acts. (pp 597 h-i & 598 a-b)

[6] The plaintiff was entitled to file a separate claim in the High Court instead of filing a counterclaim in the sessions court because it has been established by the Supreme Court in *Si & Si Sdn Bhd v. Hazrabina Sdn Bhd* that any action for damages against a petitioner whose petition for winding-up has been struck out can only be brought by an entirely separate suit founded on a tort of malicious prosecution or for abuse of process. The plaintiff had adopted the right approach by filing a separate writ action against the defendants for abuse of the process of court since he had successfully applied to set aside the BN. (pp 600 h-i & 601 a-c)

[7] The plaintiff's cause of action for abuse of process was not dependant on the outcome of the 1st defendant's claim against the plaintiff in the sessions court. The dominant purpose of the 1st defendant in applying for and obtaining the order for substituted service alleged by the plaintiff, was not to effect service of its summons and statement of claim on him but was collateral in nature in order to commence bankruptcy proceedings against him and to injure him financially. (p 601 e-h)

[Appeal allowed.]

Case(s) referred to:

Bandar Builder Sdn Bhd & Ors v. United Malayan Banking Corp [1993] 4 CLJ 7 ***(refd)***

Chee Pok Choy & Ors v. Scotch Leasing Sdn Bhd [2001] 2 CLJ 325 ***(foll)***

Development & Commercial Bank v. Aspatra Corp Sdn Bhd & Another Appeal [1996] 1 CLJ 141 ***(refd)***

Industrial Concrete Products Bhd v. Concrete Engineering Products Bhd [2001] 2 AMR 2151 ***(refd)***

Jasa Keramat Sdn Bhd & Anor v. Monatech (M) Sdn Bhd [1999] 4 CLJ 533 ***(refd)***

Lye Mun Foh v. Ong Cheow Eng [1988] 1 MLJ 522 ***(refd)***

Malaysian Building Society Sdn Bhd v. Tan Sri General Ungku Nazaruddin Ungku Mohamed [1998] 2 CLJ 340 ***(foll)***

S Manikam & Ors v. Ismail Mohamed & Ors [1997] 2 MLJ 90 ***(refd)***

Sarjit Singh Khaira v. Government of the State of Sarawak & Anor [1990] 2 CLJ 95; [1990] 3 CLJ (Rep) 59 ***(refd)***

Si & Si Sdn Bhd v. Hazrabina Sdn Bhd [1996] 3 CLJ 657 ***(foll)***

Varawa v. Howard Smith Co [1911] 13 CLR 35 ***(refd)***

Vijendran Ponniah v. Bank of Commerce [1998] 1 MLJ 418 ***(dist)***

Legislation referred to:

Rules of the High Court 1980, O. 18 r. 19(1)(b), (c), (d), (2)

For the plaintiff - Mah Kok Leong; M/s KS Su & Mah
For the defendants - Loong Chet Siean; M/s San & Loong

Reported by John Henry Louis

JUDGMENT

Su Geok Yiam JC

This is an appeal (encl. 13) by the plaintiff against the decision of the learned deputy registrar in striking out the plaintiff's cause of action against the defendants based on abuse of process of court.

Facts And Background

The 1st defendant is a private limited company. The 2nd, 3rd and 4th defendants are its directors. The plaintiff was a former employee of the 1st defendant.

In order to understand the nature of the plaintiff's claim against the four defendants it is essential that the chronology of events as they appear from the statement of claim and the two affidavits of the defendants and the sole affidavit of the plaintiff are clearly understood. These events which led to the plaintiff filing the writ action against the four defendants are as follows:

On 14 April 1995, the 1st defendant filed a civil claim against the plaintiff *vide* Summons Case No. 52-200-95 in the Ipoh Sessions Court claiming a sum of RM195,101.15 which included, *inter alia*, the sums of RM3,973 and RM183,232.50, respectively.

On 17 August 1995, ie, four months after filing the summons case, the 4th defendant who was not yet a director of the 1st defendant at that time, unlike the 2nd and 3rd defendants, lodged a police report against the plaintiff. In the report the 4th defendant alleged, *inter alia*, that the plaintiff whilst he was employed as the 1st defendant's sales manager had committed criminal breach of trust/criminal misappropriation of medicines belonging to the 1st defendant costing RM183,232.50 on 3 August 1994 and a sum of RM3,973 being proceeds from the sale of the 1st defendant's medicines during the period between 23 July 1994 and 5 September 1994.

It is clear from the date of the report and the dates of the alleged criminal breach of trust/criminal misappropriation that the 4th defendant had taken about a year to lodge the police report.

Presumably the 1st defendant's attempts in serving the summons and statement of claim on the plaintiff at No. 59, Jalan Pegoh, Taman Pengkalan SPPK, 31650 Ipoh failed.

This is because on 8 July 1995, upon the 1st defendant's application for substituted service of the summons and statement of claim, the learned sessions court judge ordered that the summons and statement of claim be served on the plaintiff by way of posting of a copy of the summons and statement of claim on the front door of the plaintiff's premises at No. 59, Jalan Pegoh, Taman Pengkalan SPPK, 31650 Ipoh, Perak and on the notice board of the Ipoh Sessions Court and that upon the expiry of 14 days of such posting the summons and statement of claim would be deemed to have been duly served on the plaintiff.

On 20 September 1995, upon the plaintiff's failure to appear in the Ipoh Sessions Court the latter gave judgment in default against the plaintiff.

Armed with the judgment in default the 1st defendant on 16 October 1995 successfully caused the Ipoh High Court to issue a bankruptcy notice against the plaintiff.

On 5 January 1996, upon the application of the 1st defendant, the learned senior assistant registrar of the Ipoh High Court ordered that the validity period of the bankruptcy notice be extended for a period of six months from the date of its expiry and further ordered that the bankruptcy notice together with a copy of the order for substituted service be served on the plaintiff by way of posting of the same on the conspicuous front of premises No. 59 Jalan Pegoh, Taman Pengkalan SPPK, 31650 Ipoh, Perak being the last known place of address of the plaintiff and a copy thereof on the notice board of the Ipoh High Court and to advertise the same with the STAR newspaper for a day and that such posting and advertisement shall be deemed good and sufficient service of the said bankruptcy notice on the plaintiff upon the expiry of seven days after the date of such last postings.

According to the plaintiff, he was totally unaware of the order of substituted service of the 1st defendant's summons and statement of claim, the judgment in default, the bankruptcy notice and subsequent order of substituted service of the bankruptcy notice against him until nine months later when he received a letter dated 22 April 1996 from Mayban Finance Berhad informing him that it would not provide him with any loan facility because upon checking, it was discovered that he had been served a bankruptcy notice on 21 March 1996.

The plaintiff post haste took steps and successfully moved the Ipoh Sessions Court to set aside the judgment in default and to allow him to file his defence on the ground that the 1st defendant was well aware of his new address but had pretended not to know and had deliberately caused confusion to the documents and the information in order to deceive the court.

The plaintiff also successfully moved the learned deputy registrar of the High Court Ipoh to set aside the bankruptcy notice with no order as to costs.

As a result thereof, the plaintiff filed the writ action against all four defendants, claiming, *inter alia*, damages for abuse of process by the four defendants in wilfully and wrongfully obtaining the judgment in default against him by applying for and obtaining an order for substituted service of the 1st defendant's summons and statement of claim on him by way of posting at an address which the plaintiff alleges the 1st defendant knew fully well was not his current address. Thereafter the 1st defendant had wrongfully instituted bankruptcy proceedings against him based on the judgment in default which

it had wrongfully obtained in the first place. By virtue of that the 1st defendant had wrongfully obtained an order for substituted service of the bankruptcy notice on him by way of posting at the same address which the plaintiff again alleges the 1st defendant knew fully well was not his current address. By doing all these acts (which are hereinafter referred to as the "said acts") the 1st defendant had caused the plaintiff to be blacklisted and unable to obtain credit facilities from financial institutions.

The plaintiff has also alleged, *inter alia*, that the said acts of the 1st defendant had injured his reputation and creditworthiness as a businessman and a housing developer resulting in his inability to develop the 'Desa Pasir Puteh' project in Pasir Puteh, Ipoh thereby causing him to suffer loss of profits amounting to RM2.25 million.

Apart from the cause of action based on abuse of process of court, the plaintiff is also relying on another cause of action, ie, conspiracy and *mala fide* deception. According to the plaintiff he had discovered the issuance of a cheque for the sum of RM42,000 by the 2nd and 3rd defendants from the 1st defendant's account. The cheque was for the purchase of a bank draft favouring one Lee Hoe Min, a child of the 3rd defendant, who was also a director of the 1st defendant. However, the debit was never reflected in the 1st defendant's account. Upon the plaintiff's discovery of the alleged wrongdoing, the 2nd, 3rd and 4th defendants had conspired together to injure the plaintiff by sacking the plaintiff as the sales manager on 10 October 1994 in order to exclude the plaintiff and conceal their wrongdoing.

Against this factual narrative, the four defendants have applied to strike out the plaintiff's claim pursuant to O. 18 r. 19 of the Rules of the High Court 1980 (hereinafter referred to as "the RHC") or in the exercise of the court's inherent jurisdiction and further or in the alternative for the same to be struck out against the 2nd, 3rd and 4th defendants. Although the defendants have averred that the bankruptcy notice had been obtained on a regular judgment and that the matter is *sub judice* because the summons case in the Sessions Court is still pending, they have not responded to the alleged impropriety of the two orders for substituted service.

In view of the decision of the Supreme Court in *Development & Commercial Bank v. Aspatra Corp Sdn Bhd & Anor Appeal* [1996] 1 CLJ 141, which was not cited by the two parties to the court, the court requested both parties to inform the court whether the plaintiff had impugned the two orders for substituted service in the Ipoh Sessions Court and High Court, respectively, and to submit further on the consequential legal implications. The court had taken this step because in that case his Lordship Peh Swee Chin, SCJ in delivering the judgment of the Supreme Court had held as follows at p. 146:

> ... The order of substituted service of the High Court, a superior court of competent jurisdiction, must be obeyed by everyone save in a few and rare exceptions and it can only be challenged as regards its validity by the only way of having it set aside by proceedings instituted for the very purpose. It cannot be challenged thus collaterally in any proceedings as regards its validity *save in a very few rare exceptions, (such as a Bankruptcy Court going behind a judgment of any court on credibly raised issues of collusion, fraud, etc., only on hearing a bankruptcy petition), which all do not apply here.* Please see *Pembinaan KSY Sdn Bhd v. Lian Seng Properties Sdn Bhd* [1991] 1 CLJ 263; *Puah Bee Hong & Anor v. Pentadbiran Tanah Daerah Wilayah Persekutuan Kuala Lumpur & Anor (Teo Keng Tuan Robert Intervener) and Another Appeal* [1994] 2 CLJ 705 and *Hadkinson v. Hadkinson* [1952] 2 All ER 567. (emphasis added).

In the case before me, Mr. Loong has informed the court that there was no application made by the defendant in the summons case (who is the plaintiff in this case) to challenge the two orders of substituted service. All that was done by the defendant was to include a prayer, in his application to set aside the judgment in default and in his application to set aside the bankruptcy notice, for the orders of substituted service to be set aside. Mr. Loong submitted that, therefore, the decision in the *Aspatra* case *(supra)* applied and since this court is not a bankruptcy court the two rare exceptions of fraud and collusion could not apply in this case and that, consequently, the plaintiff's appeal should be dismissed.

It is to be observed here that the plaintiff has alleged that the defendants practised deception on the court (initially in the Ipoh Sessions Court and subsequently in the Ipoh High Court) when the 1st defendant applied for the two orders of substituted service. In my view the plaintiff is not seeking to set aside the two orders for substituted service or to impugn the two orders for substituted service in a collateral proceeding. The plaintiff is relying on the *mala fide* conduct of the defendants in procuring the two orders for substituted service, the judgment in default and the bankruptcy notice in a separate claim founded on the tort of collateral abuse of process. In my view, he is entitled to do so because the *Aspatra* case *(supra)* and the other cases cited in that case do not concern the tort of collateral abuse of process.

In the event that I am wrong in so holding because the effect of this claim is to challenge the validity of the judgment in default and the two orders for substituted service I am of the view that the plaintiff can do so because of the decision in *Chee Pok Choy & Ors v. Scotch Leasing Sdn Bhd* [2001] 2 CLJ 325. In that case, his Lordship Gopal Sri Ram JCA has held that a judgment may be impeached for a deliberate fraud practiced upon the court. It follows, therefore, that in this case although there was a valid judgment in

default of appearance at the time the bankruptcy notice was issued, the judgment in default and the two orders for substituted service can be impeached because of the alleged deception practised by the defendants upon the court.

The Registrar's Decision

The learned deputy registrar, in striking out the plaintiff's claim based on abuse of process, ruled as follows in her grounds of judgment (encl. 14):

(a) the bankruptcy proceeding was commenced following the judgment in default which the 1st defendant had obtained in the Sessions Court *vide* Summons Case No. 52-200-95;

(b) the defendants could not be said to have abused the court process when the bankruptcy notice was issued based on a valid judgment at that point of time; and

(c) that the cause of action based on abuse of process of court should, therefore, be struck out for being frivolous and vexatious.

The learned deputy registrar also found that altogether there were three causes of action as set out in the plaintiff's statement of claim, ie, abuse of process of court, misappropriation and conspiracy. With regard to the second cause of action she ruled as follows:

(a) that the plaintiff should go back to the Sessions Court to ventilate his claim under the headings of abuse of process and misappropriation;

(b) that as the 1st defendant's action against the plaintiff in the Sessions Court is still pending the plaintiff should actually go back there to either file a counter-claim or apply to strike out the case whichever is appropriate in order to avoid duplicity of proceedings; and

(c) she stressed that she was not saying that the plaintiff had no cause of action for misappropriation.

With respect I am of the view that the plaintiff's statement of claim in the writ action sets out only two causes of action, ie, abuse of process of court and conspiracy to injure and that the averment of misappropriation was only made in order to show abuse of process and conspiracy to injure. With regard to the plaintiff's claim for conspiracy, the learned deputy registrar ruled as follows:

> However, in respect of the cause of action under the heading of conspiracy, in the sense that defendant 2 & 3 took money from first defendant's account and then subsequently sacked plaintiff from first Defendants company, I find

> that plaintiff does have a cause of action under this heading. This cause of action can stand on its own. As it was well stated by Supreme Court in the case of *Bandar Builder Sdn Bhd v. UMBC* [1993] 4 CLJ 7. "So long as the pleading disclosed some cause of action or raised some question fit to be decided by the judge the mere fact that the case was weak and not likely to succeed at the trial was no ground for the pleading to be struck out."

In the ultimate analysis, she ruled as follows:

> I hereby order that the plaintiff's cause of action on "abuse of process" and "misappropriation" to be struck out as being an abuse of process of court. The parties should go back to the Sessions Court being the proper forum to litigate these issues.

In this appeal the court will confine itself strictly to the striking out of the plaintiff's cause of action for abuse of process since there is no appeal against the other aspects of the learned deputy registrar's decision.

Before me, Mr. K.L. Mah, the learned plaintiff's counsel, and Mr. C.S. Loong, the learned defendants' counsel, have submitted at length, citing several authorities, *viz Si & Si Sdn Bhd v. Hazrabina Sdn Bhd* [1996] 3 CLJ 657; *Malaysian Building Society Sdn Bhd v. Tan Sri General Ungku Nazaruddin bin Ungku Mohamed* [1998] 2 CLJ 340; *Vijendran a/l Ponniah v. Bank of Commerce* [1998] 1 MLJ 418; *Jasa Keramat Sdn Bhd & Anor v. Monatech (M) Sdn Bhd* [1999] 4 CLJ 533; *Sarjit Singh Khaira v. Government of the State of Sarawak & Anor* [1990] 2 CLJ 95; [1990] 3 CLJ (Rep) 59; *Bandar Builder Sdn Bhd & Ors v. United Malayan Banking Corporation* [1993] 4 CLJ 7; *S. Manikam & Ors v. Ismail bin Mohamed & Ors* [1997] 2 MLJ 90.

Issues For Determination

There are two issues which require determination by this court, ie:

(a) whether the plaintiff has a cause of action against the defendants for the tort of abuse of process of court by virtue of their deliberate acts in procuring two orders for substituted service, a judgment in default and the issuance and service of a bankruptcy notice, when they knew fully well that the plaintiff was not residing at the address mentioned in their applications for substituted service, and

(b) if the answer to issue (a) is yes, whether the plaintiff should be allowed to go about it by filing a separate claim in the High Court as he has done here or he should go about it by filing a counter-claim in the Ipoh sessions court.

Abuse Of Process

In *Industrial Concrete Products Berhad v. Concrete Engineering Products Berhad* [2001] 2 AMR 2151, at pp. 2201 and 2202, his Lordship James Foong, J had this to say about the cause of action of abuse of process:

> This cause of action, with initial, scepticism (see the case of *Gasing Heights Sdn Bhd v. Aloyah Abd Rahman & Ors* [1996] 3 CLJ 695) has now been accepted in our Malaysian common law with the Court of Appeal decision of *Malaysian Building Society Berhad v. Tan Sri General Ungku Nazaruddein b. Ungku Muhammed* [1998] 2 CLJ 340. Thus:
>
> > when the purpose of bringing the proceedings is not to prosecute them to a conclusion but to use them as a means of obtaining some advantage for which they are not designed (*Re Majory* [1955] Ch 600, at p. 623-4) or some collateral advantage beyond what the law offers (*Goldsmith v. Sperring Ltd* [1977] 1 WLR at 498-9; see also *Varawa* [1911] 13 CLR, at p. 91)
>
> then a cause of action is founded. To qualify, Justice Gopal Sri Ram in the said case sets out the essential elements of this tort:
>
> (1) The process complained of must be initiated;
>
> (2) The purpose for initiating that process must be some purpose other than to obtain genuine redress which the process offers. In other words, the dominant purpose for which the process was invoked must be collateral, that is to say, aimed at producing a result not intended by the invocation of the process;
>
> (3) The plaintiff must have suffered some damage or injury in consequence.

His Lordship James Foong, J then went on to rule after applying the principles as set out in the *Malayan Building Society Berhad* case that the respondent did not use the claim for a dominant collateral purpose.

In *Malaysian Building Society Bhd v. Tan Sri General Ungku Nazaruddin bin Ungku Mohamed (supra)* his Lordship Gopal Sri Ram had set out the law on the collateral tort of abuse of process as follows:

> Every person who is aggrieved by some wrong he considers done him is at liberty to invoke the process of the court. Equally may a litigant invoke the process to enforce some claim which he perceives he has against another. When however, the process of the court is invoked, not for the genuine purpose of obtaining the relief claimed, but for a collateral purpose, for example, to oppress the defendant, it becomes an abuse of process. Where the court's process is abused, the proceedings complained of may be stayed, or if it is too late to grant a stay the party injured may bring an action based on the tort of collateral abuse of process.

The position has been neatly summed up by Lord Denning MR in his dissenting judgment in *Goldsmith v. Sperrings Ltd & Ors* [1977] 1 SLR 478, where at p 489 he said:

> In a civilized society, legal process is the machinery for keeping and doing justice. It can be used properly when it is invoked for the vindication of men's rights or the enforcement of just claims. It is abused when it is diverted from its true course so as to serve extortion or oppression: or to exert pressure so as to achieve an improper end. When it is so abused, it is a tort, a wrong known to the law. The judges can and will intervene to stop it. They will stay the legal process, if they can, before any harm is done. If they cannot stop it in time, and harm is done, they will give damages against the wrongdoer.

Though a dissenting judgment, the principle enunciated by the Master of the Rolls has been accepted as authoritative of what constitutes an abuse of process.

and at p. 356 he has stressed as follows:

> ... neither malice nor the termination of the proceedings in the plaintiff's favour are necessary elements of the tort. To put it plainly, a plaintiff in an action for abuse of process need not prove that the defendant had invoked the process of the court maliciously. Neither does he have to prove that the proceedings terminated in his favour.

In *Varawa v. Howard Smith Co.* [1911] 13 CLR 35 at 91, his Lordship Issacs J likened the use of legal process, not itself without foundation but when used for an improper collateral purpose, for example as an instrument of extortion in a matter not connected with the suit as "merely a stalking horse to coerce the defendant in some way entirely outside the ambit of the legal claim upon which the court is asked to adjudicate."

In opposing the appeal Mr. C.S. Loong has relied on the case of *Vijendran a/l Ponniah v. Bank of Commerce* [1998] 1 MLJ 418 to support his contention that there is no abuse of process because the 1st defendant in filing Summons Case No. 52-200-95 against the plaintiff and in subsequently obtaining the two orders for substituted service, the judgment in default and the issuance of the bankruptcy notice had only one purpose in mind, ie, to recover the monies alleged to have been dishonestly misappropriated by the plaintiff.

However, the court is of the view that the *Vijendran* case *(supra)* is distinguishable because the facts are different. In that case after a full trial his Lordship James Foong, J had found that there was no collateral purpose in the institution of the bankruptcy proceedings beyond what the legal process offered. In the present case the defendants are applying to strike out the plaintiff's cause of action for abuse of process under O. 18 r. 19 and so avoid having to go for trial.

In *Jasa Keramat Sdn Bhd & Anor v. Monatech (M) Sdn Bhd* [1999] 4 CLJ 533, the Court of Appeal held that abuse of process in the context of a step taken in the proceeding would include the use of interlocutory relief as an instrument of oppression. It is pertinent to point out that in the present case the plaintiff has founded his cause of action for abuse of process against the defendants not in the filing of Summons Case No. 52-200-95 by the 1st defendant in the sessions court but on the use of substituted service, judgment in default and bankruptcy proceedings against him.

The bankruptcy proceedings were anchored on the judgment in default which in turn was anchored on the order for substituted service of the 1st defendant's summons and statement of claim for a sum of RM195,578.15. The plaintiff has alleged, *inter alia*, that the 1st defendant had received the Ipoh Sessions Court when applying for substituted service of its summons and statement of claim on the plaintiff at an address which the 1st defendant knew fully well was not the current address of the plaintiff in order to achieve a dominant collateral purpose, ie, to enable the 1st defendant to obtain a judgment in default against the plaintiff, and thereafter to commence bankruptcy proceedings against the plaintiff. If these allegations are true then the defendants have abused the process of court by initiating the said acts in order to cause oppression on the plaintiff resulting in injury to his reputation and creditworthiness as a businessman and housing developer.

Whether the plaintiff will succeed in his claim based on abuse of process will depend on the outcome of his writ action. During the trial evidence will of course be adduced by both sides in order to support their respective averments and questions of fact and law raised by both parties can only be decided at the conclusion of the trial after all the evidence have been adduced by both sides. It is trite law that the plaintiff should not be deprived of the opportunity of proving his claim in court even if his case is weak and unlikely to succeed unless the defendants can satisfy the court that the plaintiff's claim is obviously unsustainable.

Sub Judice

The court is of the view that the *sub judice* argument does not arise here because the cause of action for abuse of process is not dependent on the outcome of the 1st defendant's claim against the plaintiff in the Ipoh Sessions Court.

No Evidence Is Admissible

In determining whether the plaintiff has a reasonable cause of action against the four defendants for abuse of process the court must rely solely on the plaintiff's statement of claim in line with O. 18 r. 19(2) of the RHC which expressly prohibits an applicant from relying on evidence. The court has to

read the statement of claim as a whole, viewing each paragraph in relation to the others, bearing in mind that the paragraphs cannot be viewed in isolation and assuming that all the allegations in the statement of claim are true.

Having done so the court finds as follows:

(i) the plaintiff's statement of claim has set out clearly the various allegations against the four defendants, in particular, paras 6, 7, 8, 9, 10, 11 and 12;

(ii) based on these allegations the 2nd and 3rd defendant knew that the plaintiff's address for service of process was No. 37, Jalan Pasir Kuning, Taman Delima Shatin, 31650 Ipoh, Perak Darul Ridzuan and not 59 Jalan Pegoh, Taman Pengkalan SPPK, 31650 Ipoh;

(iii) yet the defendants abused the process of court by instructing their solicitors to apply to the court for an order for substituted service for the 1st defendant's summons and statement of claim in Summons Case No. 52-200-95 to be posted at the latter address;

(iv) this had resulted in the 1st defendant obtaining the judgment in default against the plaintiff;

(v) based on the judgment in default the defendants subsequently caused a bankruptcy notice to be issued against the plaintiff;

(vi) the defendants again applied for substituted service of the bankruptcy notice at the latter address when they were fuly aware it was not the plaintiff's address;

(vii) the defendants caused the order for substituted service of the bankruptcy notice and a copy of the bankruptcy notice to be posted at the latter address and also advertised it in the "The Star" newspaper resulting in the plaintiff's name being posted in the Financial Services Information;

(viii) consequently all the plaintiff's applications for bank loans and overdraft facilities were rejected;

(ix) the plaintiff had successfully applied to set aside both the judgment in default and the bankruptcy notice by showing that he was not at the latter address;

The court is also of the view that this is not a plain and obvious case for striking out although the bankruptcy notice was issued based on a valid judgment in default at the relevant time. The reason is because according to the plaintiff the process was not initiated *bona fide* in order to enforce the

just claims of the 1st defendant. The plaintiff's claim for damages for abuse of process is also not frivolous nor vexatious because the defendants have not shown that it is impossible for the plaintiff to succeed in his claim for abuse of process against the defendants based on the said acts.

Striking Out Under O. 18 r. 19 Of The RHC

In *Sarjit Singh Khaira v. Government of the State of Sarawak & Anor* [1990] 2 CLJ 95; [1990] 3 CLJ (Rep) 59 Haidar, J (as he then was) has very comprehensively set out, the principles governing an application under O. 18 r. 19 of the RHC, before applying them to the facts in that case and subsequently dismissing the plaintiffs' application to set aside the writ and service pursuant to O. 18 r. 19 of the RHC. The relevant passages in his judgment are reproduced as follows for their full import:

> No reasonable cause of action
>
> It is my view well established that it is only in plain and obvious cases that recourse should be had to the summary procedure under this provision. In this respect, Yusoff Mohamed J (as he then was) clearly stated the law in *Zakaria bin Mohamed Esa v. Dato' Abdul Aziz bin Ahmad & Ors*:
>
> > First, no reasonable cause of action. In considering this statement of claim as disclosing no reasonable cause of action, no evidence is admissible – see O. 18 r. 19, para (2). It is settled rule that the pleading must be read as a whole, each paragraph must be viewed in relation with the others and cannot be viewed in isolation and in *Peck v. Russell* [1923] 4 FMSLR 32, 34 it was held there that the plaint and its documents alone should be considered and all the allegations in it should be assumed to be true.
>
> At p. 223, the learned judge went on to say:
>
> > While repeating that *Peck v. Russell* [1923] 4 FMSLR 32, 34 lays down the rule that all allegations in the statement of claim are presumed to be true and the court is not concerned at this stage of the proceedings whether those allegations are unfounded the point of law raised by the learned senior federal counsel, if it is considered sufficiently important, clearly requires serious discussion and the proper course open to the defendants would be to take an objection on the pleadings and the point set down for argument under O. 33 r. 2, Rules of the High Court 1980 – see *Hubbuck v. Wilkinson* [1899] 1 QB 86, 91.
>
> According to *Mallal's Supreme Court Practice* (2nd edn) at p. 220, 'If there is an issue to be tried it can only be tried by the action pursuing its normal course and being heard in open court: *Low Yat v. Grace* [1947] MLJ 115.' Further, on the same page, it is stated, 'the mere fact that the case is weak and unlikely to succeed is no ground for striking out the statement of claim'.

Frivolous and vexatious

By these words are meant cases which are obviously unsustainable (see p. 322, para. 18/19/15 of The Supreme Court Practice 1988 (Vol 1). Pike CJ (Borneo) in *Stephen Kalong Ningkan v. Tun Abang Haji Openg & Anor (No. 2)* at p. 47 said:

> The burden upon an applicant who asks that a writ of summons and statement of claim be struck out is a heavy one. He must be able to show that the action must fail or that for some other reason it is an abuse of the process of the court or is frivolous or vexatious. See *Goodson v. Grievson* [1908] 1 KB 761. This case has stood the test of time and was expressly approved in *Charles Forte Investment Ltd v. Amanda* [1963] 3 WLR 662. Lord Justice Wilmet at p. 666 says:
>
> > As to the circumstances in which the inherent jurisdiction of the court may be invoked, I entirely accept the judge's caution, which he quoted from the Annual Practice 1963 p 577, that this is a jurisdiction to be exercised with great circumspection. Mr. Instone this morning has properly shown our attention to an authority, *Goodson v. Grierson*, which expresses the test to be applied as being whether it is impossible for the party concerned to succeed on his claim.

Abuse of the process of the court

This term connotes that the process of the court must be used *bona fide* and properly and must not be abused. In this respect, Dankwerts LJ in *Wenlock v. Moloney & Ors* at p 874 said:

> The position is very clearly expressed by Lord Herschell in *Lawrence v. Lord Norreys* [1890] 15 App Cas 210. He said:
>
> > It cannot be doubted that the court has an inherent jurisdiction to dismiss an action which is an abuse of the process of the court. It is a jurisdiction which ought to be sparingly exercised, and only in very exceptional cases. I do not think its exercise would be justified merely because the story told in the pleadings was highly improbable, and one which it was difficult to believe could be proved.
> >
> > In that case, the application succeeded in the Court of Appeal and the House of Lords because those courts concluded that the story told in the proceedings was a myth, and so the action was an abuse of the process of the court. It was a plain and obvious case. The position under two former rules (3) has been incorported in the present RSC O. 18 r. 19 of the new rules. There is no doubt that the inherent power of the court remains; but this summary jurisdiction of the court was never intended to be exercised by a

> minute and protracted examination of the documents and facts of the case, in order to see whether the plaintiff really has a cause of action. To do that, is to usurp the position of the trial judge, and to produce a trial of the case in chambers, on affidavits only, without discovery and without oral evidence tested by cross-examination in the ordinary way. This seems to me to be an abuse of the inherent power of the court and not a proper exercise of that power.

The principles governing the exercise of the court's powers to summarily strike out a claim have also been very clearly reiterated by the Supreme Court in *Bandar Builder Sdn Bhd & Ors v. United Malayan Banking Corp Bhd* [1993] 4 CLJ 7 and applied in many decided cases. (See for eg, *Lye Mun Foh v. Ong Cheow Eng* [1988] 1 MLJ 522 and *S Manikam & Ors v. Ismail bin Mohamad & Ors* [1997] 2 MLJ 90).

In the *Bandar Builder Sdn Bhd & Ors* case *(supra)* the Supreme Court had reiterated as follows:

> (1) The principles upon which the court acts in exercising its power under any of the four limbs of O. 18 r. 19(1) of the RHC are well settled. It is only in plain and obvious cases that recourse should be had to the summary process under this rule and the summary procedure can only be adopted when it can clearly be seen that a claim or answer is on the face of it 'obviously unsustainable'. It cannot be exercised by a minute examination of the documents and facts of the case in order to see whether the party has a cause of action or a defence.
>
> (2) ... So long as the pleadings disclosed some cause of action or raised some question fit to be decided by the judge, the mere fact that the case was weak and not likely to succeed at the trial was no ground for the pleadings to be struck out. It cannot be said that they were frivolous, vexatious or may prejudice, embarrass or delay the fair trial of the action or that these pleadings were otherwise an abuse of the process of the court.

Similarly here, for the reasons already set out above, this court finds that the plaintiff's writ action is not obviously unsustainable. Neither is it frivolous, vexatious or may prejudice, embarass or delay the fair trial of the 1st defendant's case in the Ipoh Sessions Court. Further, the plaintiff's statement of claim in the writ action is not an abuse of the process of court.

Filing Of A Separate Claim

I am of the view that the plaintiff is entitled to file a separate claim in the High Court instead of filing a counterclaim in the summons case in the Sessions Court because it has been established by the Supreme Court in *Si & Si Sdn Bhd v. Hazrabina Sdn Bhd* [1996] 3 CLJ 657 that any action for

damages against a petitioner whose petition for winding-up has been struck out can only be brought by an entirely separate suit founded on a tort of malicious prosecution or for abuse of process.

In that case the respondent had applied by way of a notice of motion pursuant to O. 18 r. 19(1)(b), (c) and (d) of the RHC for an order to strike out the winding-up petition filed by the appellant. The respondent further claimed for damages in the notice of motion on the basis that its bank accounts were frozen and that it was unable to carry on its business activities following the issuance of the winding-up petition against it.

In this case the plaintiff has adopted the right approach by filing a separate writ action against the four defendants for damages for abuse of the process of court since he has successfully applied to set aside the bankruptcy notice.

The case of *Malaysian Building Society Bhd v. Tan Sri General Ungku Nazaruddin bin Ungku Mohamed (supra)*, although cited by Mr. C.S. Loong also supports the plaintiff's contention that a respondent in a bankruptcy proceeding who succeeds in obtaining an annulment of an adjudicating order and the recission of a receiving order cannot proceed to obtain an order for damages in the same proceeding because the High Court exercising bankruptcy jurisdiction has no power to make the order granting damages to the respondent.

In the opinion of the court the very nature of the plaintiff's claim for abuse of process of court necessitates the filing of a separate action because it is clear that the plaintiff's cause of action for abuse of process is not dependent on the outcome of the 1st defendant's claim against the plaintiff in the Ipoh Sessions Court. Whether the 1st defendant is able to succeed in its claim against the plaintiff in the Ipoh Sessions Court for the sum of RM195,101.15 with interest and costs has no bearing whatsoever on the outcome of the plaintiff's claim in this writ action against the defendants. As has been reiterated many times in this judgment, the plaintiff is saying that the dominant purpose of the 1st defendant in applying for and obtaining the order for substituted service is not to effect service of the 1st defendant's summons and statement of claim on the plaintiff but was collateral in nature in order to commence bankruptcy proceedings against him and to injure him financially by applying for and obtaining a judgment in default against him and anchoring the bankruptcy proceedings on the judgment in default.

In the premises, I allow this appeal with costs and set aside the order of the learned deputy registrar.